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OCTOBER TERM, 1972

No. 71-1474

ALBERT B. EASON, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

No. 71-1601

JEFFERSON PARISH SCHOOL BOARD, *et al.*,

Petitioners,

—v.—

LENA VERN DANDRIDGE, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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Opinions Below

The opinion in the United States Court of Appeals for the Fifth Circuit is reported at 456 F.2d 552 and the August 13, 1971, opinion of the District Court for the Eastern District of Louisiana is reported at 332 F.Supp. 590. Since the latter opinion is not set out in the appendix

to either of the petitions for certiorari, we have done so in an appendix to this brief.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the decisions of the courts below requiring the implementation of school desegregation plans that would effectively dismantle a dual school system are in accord with this Court's decision in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Statement

The statements in the Petitions for Certiorari filed by the School Board and by a group of intervenors are noticeably deficient in setting out the facts of this case. Those facts are contained in the opinions of the district court and the Court of Appeals and will be only briefly summarized here.

1. The Jefferson Parish School District was segregated pursuant to the law of the State of Louisiana prior to the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). No steps whatsoever were taken to dismantle the dual school system until the filing of the present action in 1964 (ten years after *Brown*.)

2. No desegregation plan in the history of this litigation has been entered voluntarily by the School Board. At every stage the district court has had to require the School

Board to submit a plan that complied with the then current standards for school desegregation plans. The most recent round of this litigation, the one involved here, resulted from the decision of this Court in the *Swann* case.

3. Prior to the present plan the School Board had been operating under essentially a "neighborhood school" plan based on geographic zones. Under that plan 19 of the 75 schools in the system, or 25%, were either all or virtually all of one race. Twenty-one percent of the pupils in the system attended these 19 schools.

4. Similarly, there were substantial imbalances in the racial makeup of faculties in the schools in the system, with many of the schools having faculties that were predominantly of one race.

5. Because the existing plan did not comply with the standards established by this Court in *Swann, United States* v. *Montgomery County Bd. of Ed.,* 395 U.S. 225 (1969), and prior decisions, the plaintiffs filed a motion for further relief requesting that the School Board be required to submit a plan that would take into account the racial makeup of the school system as a whole, that would eliminate the all-one race schools and that would result in the makeup of faculties and student bodies that were reasonably close to the system-wide ratios.

6. The district court, pursuant to the dictates of *Swann,* entered precisely such an order. It took into account racial ratios only for the purpose of assuring the end of one-race or predominantly one-race schools. No rigid racial ratio was fixed or adhered to. Thus, in elementary schools the percentage of black students would range from 10 to 38 percent. In junior highs the range would be from 13

to 40 percent. 332 F.Supp. at 591 (App. to this Brief, p. 2a).

The School Board and the intervenors appealed the order of the district court and it was affirmed by the Fifth Circuit on February 11, 1972. Prior to the affirmance by the Court of Appeals the School Board had asked that court for a stay of the implementation of the district court order. When the Court of Appeals denied the stay, application was made to Mr. Justice Marshall, acting as Circuit Justice for the Fifth Circuit. He denied the stay on August 30, 1971, 404 U.S. 1219, citing *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), and subsequent decisions. As Mr. Justice Marshall pointed out:

> There are no unusual circumstances in this case. The schools involved have been mired in litigation for seven years. Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. 404 U.S. at 1220.

In its February 11, 1972 decision the Court of Appeals held that the district judge in all respects had complied with the requirements of *Swann.* It pointed out that under the plan only 3,000 additional students were to be bused in contrast to the 23,000 bused in *Swann.* Moreover, the average daily round trip in the present case would be only seven miles whereas in *Swann* it would be 15 miles. Thus, under the rule of *Swann* the district court had acted fully within its discretion in fashioning an appropriate remedy to bring about a final end to a dual system of schools.

Reasons Why the Writ Should Be Denied

In essence, the petitioners in both of these cases are asking no more and no less than that this Court reconsider and overrule its unanimous holding in *Swann*. They point to no facts that distinguish the present case from *Swann*. They make the bald assertion that the 19 one-race schools which the district court required to be desegregated were the result of housing patterns over which the School Board had no control. No facts are set out to support this allegation, or to show that these schools, which have always been one race, are not vestiges of the dual system. Therefore, as the district court held, 332 F. Supp. at 594 (App. to this Brief, pp. 6a-7a), the School Board clearly did not comply with the rule of *Swann:*

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. at 26.

The School Board did not so satisfy the district court and neither of the petitioners here have presented any evidence or any argument that would show that the court's conclusion was erroneous.[1] In short, as the Court of Appeals pointed out, "the real thrust" of the argument of the

[1] As the Court of Appeals pointed out, the school board did no more than make "an allusion to housing patterns." 456 F.2d at 553 (App. to cert. petition in No. 71-1474, pp. 10a-11a).

School Board and the intervenors "is a plea for neighborhood schools." 456 F.2d at 553 (App. to Petition for Certiorari in No. 1474, p. 10a). Such a plea has already been rejected by this Court in *Swann*.

Finally, the petitioners spend some time in rearguing another question laid to rest by this Court's decision in *Swann*, viz., that 42 U.S.C. § 2000c limits the power of federal courts to require transportation in school desegregation cases brought under the Fourteenth Amendment. They present no new arguments and no substantial reasons why this Court's considered judgment on that issue in *Swann* should be abandoned.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opinion of District Court, August 13, 1971

REASONS FOR RULING

CHRISTENBERRY, *District Judge.*

Pursuant to this court's order of July 9, 1971, the defendant, Jefferson Parish School Board, submitted a new desegregation plan on August 2, 1971, to cover the elementary and middle schools of Jefferson Parish, Louisiana, commencing with the 1971-1972 school year. It was the School Board's opinion that the plan was not educationally sound and not constitutionally required and, therefore, the Board did not recommend the plan. The court has studied the plan and has held open-court hearings on August 7 and 9, 1971, to determine whether the plan complies with constitutional requirements and whether it can feasibly be implemented.

In the school year ending in June, 1971, the School Board was operating 75 public schools in Jefferson Parish, and serving 63,000 pupils. Approximately 80 percent of these pupils are white and 20 percent are black. The evidence presented prior to the order of July 9, 1971 demonstrated that the Parish school system contained 19 one-race or virtually one-race schools, more than one-fourth of the total number of public schools in the Parish. It was further shown that approximately 13,000 pupils or 21 percent of the total, attended these one-race schools. It was this court's opinion then and it is now that the perpetuation of this degree of segregation negated the School Board's argument that it had completely abandoned its dual system of public education.

Under the new plan submitted by the School Board a creditable effort has been made to integrate all public

schools in Jefferson Parish so that no school is racially identifiable. Relying on the information made available by the School Board, the plaintiffs unqualifiedly endorsed the plan and asked that it be adopted by this court. Based on anticipated enrollments, the plan would integrate the Parish elementary schools in varying white-black ratios that range from ten percent black pupils in some schools up to 38 percent black pupils in others. The integration of middle (junior high) schools would vary from 13 percent black pupils to 40 percent black pupils. The court had directed that the School Board be guided by the racial balance principle but at the same time minimize busing and preserve geographic zoning criteria as much as possible by the use of other means of school desegregation. To this end the Board, in formulating its plan, altered boundaries for elementary and middle school attendance zones and thus limited busing to a maximum of an additional 3,000 pupils. The resulting variance in percentages is in this light understood. Racial housing patterns and natural and non-natural geographic barriers also, of course, help explain these variances. Inasmuch as the Parish serves approximately 63,000 pupils, 13,000 of which were formerly in one-race schools, a plan that integrates all previously one-race schools while requiring busing for no more than 3,000 additional pupils, less than five percent of the total, is not considered by this court to place a severe burden on the School Board.

Of these 3,000 additional children that may be subject to busing, the School Board presented evidence to the effect that 90 percent are black. While it would be impermissible for the Board, in complying with a constitutional duty, to place a heavier burden on one race by design, there was no showing of bad faith in this regard. Plaintiffs' counsel, moreover, saw no reason to object to the plan for this (or any other) reason.

Evidence was also received at the August 9th hearing concerning logistical difficulties that the Board anticipates would result from the institution of the new plan. A witness for the Board testified that from 20 to 30 additional buses would be required. It is pertinent, however, that the Parish does not buy or own any of the buses used to transport pupils to and from school. Instead, bus drivers are employed who provide their own buses and they are paid by the state approximately $7,000.00 per annum. The Parish School Board then supplements each driver's salary by $305.00 per annum, meaning that the additional cost in transportation to the Parish, if in fact 30 additional buses are needed, would be approximately $9,150.00. In addition, there was testimony to the effect that new buses are not readily available and that difficulties will be encountered in notifying parents and children of new school assignments. While the court deems this evidence relevant to the feasibility of adopting a new plan, such evidence is not of paramount consideration where constitutional rights are at stake and where the law, for a number of years, has clearly charged school boards "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County School Board, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). The fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan or the fact that some schools may not begin the school year in a routinely smooth fashion does not justify in these circumstances the continuation of a less than unitary school system and the resulting denial of an equal educational opportunity to a certain segment of the Parish school children.

Evidence presented at the August 9th hearing also indicated that under the plan the average daily roundtrip dis-

tance for the additional pupils to be bused will be about seven miles as opposed to a previous average roundtrip distance of about two and a half miles for pupils already being transported. One witness testified that the longest roundtrip distance for any child will be 14 miles and that the time for this roundtrip would be one hour. Busing has for many years been widely used in Jefferson Parish due to the suburban and semi-rural nature of the area. It is the practice of the School Board to provide transportation for all pupils living more than a mile from school and for those living less than a mile from school if a safety factor is involved. While the court is cognizant of the complications that can arise from busing young children, the burden in this set of circumstances again does not appear excessive for either the children, their parents, or the School Board. There is little room for doubt that much of the busing which is required in Jefferson Parish is due to the past practices of a dual system, the vestiges of which have lingered on.

As the Supreme Court stated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 31, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554 (1971), "[d]esegregation plans cannot be limited to the walk-in-school." In *Swann* the average roundtrip distance that elementary children were transported was twice that of this case. The Supreme Court gave approval to that plan and to busing as a permissible tool of school desegregation. The relevant factors to be considered for the approval of a plan that entails some busing are the time and distance of travel, the age of the pupils, the capacity of the school system to provide transportation, and the extent to which busing has previously been a characteristic of the system. Considering all of these factors, the court finds that the busing called for in the School Board's plan is reasonable and workable.

More importantly, the plan should establish a genuinely unitary school system that will be realistic and effective.

Finally, the School Board, in not recommending the plan, contends that a unitary system has existed in Jefferson Parish since 1969 and that all of the existing one-race or virtually one-race schools are the result of de facto segregation and, therefore, the school system is not susceptible to the type of relief sought by plaintiffs. For the reasons set forth below, this contention is unfounded and erroneous.

It is true that the mandate of the Fourteenth Amendment's equal educational opportunity principle to eliminate dual-system education and to establish workable and effective unitary systems is directed only to de jure segregation. Swann v. Charlotte-Mecklenburg Board of Education, *supra;* Green v. County School Board, *supra;* Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This mandate, however, does not cease merely because school authorities in a system with a history of school segregation undertake some desegregation, but rather the duty continues until all vestiges of the de jure system are eradicated. While the point at which this occurs may not always be easily discernible, the need for further relief in the Jefferson Parish system is clear. As stated above, the segregation of 19 of the 75 Parish schools has remained intact, meaning that over one-fifth of the pupils served by the Parish remain in a segregated school environment.

Beginning with the 1965-1966 school year, by this court's order, the compulsory dual school system of Jefferson Parish was formally discontinued and a plan was implemented which embodied the freedom-of-choice concept. Because of this plan's ineffectiveness and in accordance with *Green, supra,* this court adopted another plan commencing with the 1969-1970 school year and ordered the Board to operate a unitary, non-discriminatory system. At

that time the extent of the court's remedial power in dealing with the vestiges of a dual and unconstitutional school system was undefined. In the *Swann* decision, however, the Supreme Court squarely confronted this issue and discussed the means that are within the discretionary use of a district court for the elimination of the remnants of state-imposed segregation. The fact that the School Board may have been under the impression that a unitary system was in operation in Jefferson Parish and the fact that the Board complied with the 1969 order is not grounds for a denial of further relief here. "[W]hatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Green, supra*, 391 U.S. at 439, 88 S.Ct. at 1695.

The contention of the School Board that the persistence of one-race schools should be attributed to residential housing patterns and therefore should be labeled de facto segregation is to by-pass the realistic view that the former dual system has never been fully dismantled. That the court now finds that further relief must be granted is not to say that the School Board has not been operating in good faith, but rather it is based upon an evaluation of the system's operations prior to and since 1969 in juxtaposition to *Swann*.

It is the court's duty now to try to ensure that the relief rendered will fully comport with constitutional requirements and thus at last establish a unitary system. To this end the court feels that the one-race schools in the Parish can no longer be tolerated. When a school board undertakes to convert a dual system into a unitary system with the result that a substantial number of one-race schools remain, then it is presumed that the conversion has been incomplete. To rebut this presumption, it was incumbent upon the School Board officials to show that these one-race

schools are "not the result of present or past discriminatory action on their part." *Swann, supra,* 402 U.S. at 26, 91 S.Ct. at 1281.

The only evidence that the school officials mustered to refute this presumption of continued de jure segregation was an allusion to housing patterns. In view of the Parish's past history of officially sanctioned school segregation and because these schools cannot be said to have been desegregated and then resegregated by shifting population trends the court is not persuaded that this is a de facto situation. In reply to the argument that school authorities with a history of de jure segregation need only devise a colorblind assignment plan, the Supreme Court stated in *Swann, supra,* 402 U.S. at 28, 91 S.Ct. at 1282:

> " 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral."

Applying this doctrine and remembering that "[t]he measure of any desegregation plan is its effectiveness," Davis v. Board of School Commissioners, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971), the court finds that the 1969 plan was inadequate and must be superseded by the new plan.

In accordance with *Swann,* if the implementation of this plan results in full compliance with the *Brown* decision,

then the School Board will be relieved from making further adjustments in school desegregation. 402 U.S. at 31-32, 91 S.Ct. 1267. It is hoped that this plan, coupled with the Board's good faith, will make future adjustments unnecessary by this court's order. Good faith encompasses, *inter alia*, strategically selecting the construction sites of future schools so that desegregation will be enhanced; the number of pupils to be accommodated by new schools; and by the old schools that the School Board decides to abandon. A recurring problem for a court in adopting a desegregation plan is often the foreseeability of resegregation. The Board is therefore charged with the duty of pursuing a school construction and abandonment policy which will in all respects enhance and facilitate desegregation. See *Swann, supra*, 402 U.S. at 20-21, 91 S.Ct. 1267.

The court feels constrained at this point to address briefly the doubts raised by counsel for the School Board concerning the continued quality of public education in the Parish school system. The attitude of the public has all too often reflected an unwillingness to make a short-term sacrifice in public education in order to achieve important long-range goals; namely, an equal education for persons of all races, and, correspondingly, an equal opportunity for all persons to enter the economic mainstream of American life. In this case, however, the burden to be incurred by the defendant School Board in implementing this plan is so de minimis in and of itself and compared with other school desegregation cases that the court does not agree that any decrease in the quality of education should result from this plan. In addition, the guarantee of an equal educational opportunity is in no way limited to the central city of a metropolitan community, but is equally applicable to suburban areas. In other words, suburban school boards are not immunized from the responsibilities of the Four-

teenth Amendment even though it means facing problems that have long beset the adjacent central city.

In accordance with these written reasons, plaintiffs' motion for further relief is granted and the plan submitted by the Jefferson Parish School Board on August 2, 1971, is adopted. The court entered its order to this effect on August 10, 1971.